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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

ANTON ACEVEDO,

Defendant and Appellant.

G057406

(Super. Ct. No. 02CF2503)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Robert R. Fitzgerald, Judge. (Retired judge of the Orange Super. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Reversed and remanded with directions.

Cynthia M. Jones, under appointment by the Court of Appeal, for
Defendant and Appellant.

Xavier Becerra, Attorney General, Julie L. Garland, Assistant Attorney
General, Daniel Rogers, Adrienne S. Denault and Christopher P. Beesley, Deputy
Attorneys General, for Plaintiff and Respondent.

* * *

In 2004, a jury convicted defendant Anton Acevedo of seven burglaries, a vehicle theft, and one count of receiving stolen property. The trial court found true six strike priors, four prison priors, and three serious felony priors. The court imposed a total aggregate prison sentence of 240 years to life.

In a divided opinion, this court reversed four of Acevedo's burglary convictions for insufficient evidence and remanded the matter for resentencing. (*People v. Acevedo* (July 20, 2006, G034816) [nonpub. opn.] (*Acevedo I*)). But the trial court did not conduct a hearing on remand; instead, the court simply filed an amended abstract of judgment with a new sentence (currently 90 years to life). When Acevedo became aware of his resentencing, the time for filing an appeal had passed. Years later, a federal court granted Acevedo a writ of habeas corpus, allowing him to file this appeal.

Acevedo's primary argument is that he was entitled to be present at a resentencing hearing. He is correct; the Attorney General agrees. Thus, we will reverse Acevedo's sentence. There have also been some changes to some relevant sentencing laws in the meantime, so we will again remand with directions.

I

FACTUAL AND PROCEDURAL BACKGROUND

In 2002, police arrested Acevedo and recovered stolen property, which they traced to the burglaries of six homes and a storage unit. The victims identified their stolen property at trial. Another witness testified under a grant of immunity; she linked Acevedo to three of the residential burglaries. (*Acevedo I, supra*, G034816.)

The jury found Acevedo guilty of nine felonies: six counts of first degree burglary, one count of second degree burglary, one count of receiving stolen property, and one count of unlawfully taking a motor vehicle. The court found true six strike priors, four prison priors, and three serious felony priors. At sentencing, the court struck the prison priors and imposed an aggregate prison term of 240 years to life: 25 years to

life for each of the nine felony convictions (225 years to life), plus five years for each the three serious felony priors (15 years). (*Acevedo I, supra*, G034816.)

In 2006, this court reversed three of the first degree burglary convictions and the second degree burglary conviction for insufficient evidence. (*Acevedo I, supra*, G034816.) Given the reversals, there was a remaining issue as to whether the consecutive sentence on the receiving stolen property conviction (count two) violated Penal Code section 654.¹ (*Acevedo I, supra*, G034816.) The matter was “remanded to the trial court for resentencing.” (*Ibid.*) The majority left “it for the trial court to determine whether sentencing defendant on count 2 would violate section 654.” (*Ibid.*)

Relevant Post-Appellate Proceedings

In 2006, the trial court struck three of Acevedo’s burglary convictions on remand. The court later filed an amended abstract of judgment with a new total sentence of 140 years to life. However, the court did not conduct a resentencing hearing, nor did it address the section 654 issue.

In 2008, the trial court denied a writ of habeas corpus. However, the court noted there was a “clerical error” as far Acevedo’s sentence. The court filed a second amended abstract of judgment with a new total sentence to 115 years to life.

In 2014, Acevedo filed a section 1170.126 petition (a request to resentence for any “third strikes” that were not violent or serious). The court conducted a hearing in which Acevedo waived his appearance. The court later filed a third amended abstract of judgment with a new total sentence of 90 years to life: 75 years to life for the three remaining first degree burglary convictions, and a determinate 15 years for the three five-

¹ Further undesignated statutory references are to the Penal Code. Generally, a defendant may not be punished for both stealing and receiving the same stolen property; one of the punishments must usually be stayed. (§ 654; *People v. Allen* (1999) 21 Cal.4th 846, 866.)

year serious felony priors; the court also imposed six-year concurrent sentences for the receiving stolen property and vehicle theft convictions.

In 2018, the Ninth Circuit Court of Appeals filed an opinion finding prejudicial error in the post-appellate proceedings. The Court ordered a “remand with instructions to grant a conditional writ of corpus directing the State to allow Acevedo to pursue his direct appeal.” The Court found “Acevedo could have argued that his sentence for burglary and receipt of stolen property violates California Penal Code § 654’s prohibition against multiple punishments for the same conduct. [Citation.] Not only did the State acknowledge this error . . . , the state appellate court remanded for the trial court to address the sentencing issue.”

II

DISCUSSION

Acevedo argues a remand is necessary so the trial court can: A) conduct a resentencing hearing in his presence to rule on the section 654 issue; B) exercise its (now existing) discretion to dismiss any or all of his serious felony priors; and C) “preserve” its earlier sentencing rulings on his section 1170.126 petition.

We agree that a remand is necessary to resolve the section 654 issue and Acevedo has the right to be present. We also agree that the trial court can exercise its discretion to dismiss Acevedo’s serious felony priors. But we disagree as to “preserving” the court’s prior sentencing rulings. On remand, a trial court can generally reconsider any of its earlier discretionary sentencing rulings, provided it does not impose a greater total aggregate sentence. (*People v. Buycks* (2018) 5 Cal.5th 857, 893-895.)

A. Personal Presence at Resentencing

Under our state Constitution, a “defendant in a criminal cause has the right to . . . be personally present with counsel.” (Cal. Const., art. I, § 15.) Similarly, under

the confrontation clause of the Sixth Amendment of the federal Constitution, a defendant has the “right to be present in the courtroom at every stage of his trial.” (*Illinois v. Allen* (1970) 397 U.S. 337, 338.) A defendant’s state constitutional right to be present is generally coextensive with his or her federal constitutional right. (*People v. Harris* (2008) 43 Cal.4th 1269, 1306.)

In California, there is also a requirement that a felony defendant “shall be personally present at the arraignment, at the time of plea, during the preliminary hearing, during those portions of the trial when evidence is taken . . . , and at the time of the imposition of sentence.” (§ 977, subd. (b)(1).) The right to be present “depends on two conditions: (1) the proceeding is critical to the outcome of the case, and (2) the defendant’s presence would contribute to the fairness of the proceeding.” (*People v. Perry* (2006) 38 Cal.4th 302, 312.) Generally, a defendant’s right to be personally present extends to any resentencing proceedings that involve any issues that are not purely legal in nature. (See, e.g., *People v. Simms* (2018) 23 Cal.App.5th 987, 996.)

“When an appellate court’s reversal is accompanied by directions requiring specific proceedings on remand, those directions are binding on the trial court and *must* be followed. Any material variance from the directions is unauthorized and void.” (*Butler v. Superior Court* (2002) 104 Cal.App.4th 979, 982.)

Here, in the earlier appeal, we directed the trial court on remand to determine whether a consecutive sentence for the receiving stolen property charge was barred under section 654. This was (and remains) a factual question based on which particular item of stolen property the jury agreed upon, and which of the robbery convictions were reversed on appeal. The trial court plainly erred by not holding a resentencing hearing at which Acevedo had the right to be personally present.

Thus, we reverse Acevedo’s sentence and remand for resentencing at which the court is directed to resolve the outstanding section 654 issue. Acevedo will have the right to be personally present at the hearing or to waive his presence.

B. Serious Felony Prior Convictions

Again, the trial court imposed three five-year sentencing enhancements based on Acevedo's three prior serious felony convictions. (§ 667, subd. (a)(1).)

Prior to January 1, 2019, a trial court's sentencing discretion regarding prior serious felony convictions was severely restricted: "This section does not authorize a judge to strike any prior conviction of a serious felony for purposes of enhancement of a sentence under Section 667." (Former § 1385, subd. (b).) However, the Legislature has since amended the statute. The statute now provides: "If the court has the authority . . . to strike or dismiss an enhancement, the court may instead strike the additional punishment for that enhancement in the furtherance of justice" (§ 1385, subd. (b)(1), as amended by Stats. 2018, ch. 1013, § 2, eff. Jan. 1, 2019.)

Acevedo argues that the amended version of section 1385, subdivision (b)(1), applies retroactively because his case is not yet final on appeal. (See *In re Estrada* (1965) 63 Cal.2d 740, 745.) The Attorney General concedes the issue and we agree.

Thus, the trial court may exercise its sentencing discretion on remand concerning Acevedo's three serious felony prior convictions.

C. The Full Resentencing Rule

In 2014, Acevedo filed a section 1170.126 petition. As a result, the trial court reduced Acevedo's 25-year-to-life sentences for the receiving stolen property and vehicle theft convictions (counts two and seven). The court imposed concurrent terms of six years for each conviction (the upper term doubled).

Acevedo argues: "It is not clear from case law whether this subsequent resentencing would be voided as a result of an earlier resentencing being vacated. In an abundance of caution, appellant requests that on remand, the trial court also be directed to impose the determinate terms previously imposed on Counts 2 and 7." We disagree and decline to restrict the trial court's sentencing discretion on remand.

“[W]hen part of a sentence is stricken on review, on remand for resentencing ‘a full resentencing as to all counts is appropriate, so the trial court can exercise its sentencing discretion in light of the changed circumstances.’” (*People v. Buycks, supra*, 5 Cal.5th at p. 893.) The California Supreme Court has named this rule the “‘full resentencing rule’” under which a trial court may “‘modify every aspect of the defendant’s sentence on the counts that were affirmed, including the term imposed as the principal term.’” (*Ibid.*) The trial court may “reconsider[] its prior sentencing choices made under the normal rules of felony sentencing . . . , so long as the total prison term for all affirmed counts does not exceed the original aggregate sentence.” (*People v. Burbine* (2003) 106 Cal.App.4th 1250, 1253.)

When a case is remanded for resentencing the trial court is entitled to consider the entire sentencing scheme; not limited to merely striking illegal portions, the trial court may reconsider all sentencing choices. (*People v. Hubbard* (2018) 27 Cal.App.5th 9, 12-13.) “‘This rule is justified because an aggregate prison term is not a series of separate independent terms, but one term made up of interdependent components.’” (*People v. Burbine, supra*, 106 Cal.App.4th at p. 1258.)

Here, we do not intend to influence the trial court’s sentencing decisions on remand one way or the other. But we do hold the trial court *could* revisit its earlier discretionary sentencing rulings under the earlier section 1170.126 petition, provided that Acevedo’s total aggregate sentence does not exceed his current aggregate sentence of 90 years to life. (See *People v. Brown* (1987) 193 Cal.App.3d 957, 961 [“As a general rule, a greater sentence may not be imposed upon remand after an appeal. This rule arises from the need to ‘preclude vindictiveness and more generally to avoid penalizing a defendant for pursuing a successful appeal’”].)

III

DISPOSITION

Acevedo's sentence is reversed. The trial court shall conduct a resentencing hearing on remand at which Acevedo will have the right to be present; the court is directed to rule on the unresolved section 654 issue at the hearing. The court is further directed to impose a new sentence within the bounds of its now existing statutory sentencing discretion, as discussed within this opinion.

MOORE, J.

WE CONCUR:

O'LEARY, P. J.

BEDSWORTH, J.